REVIEWS AND COMMENTS

ON THE DRAFT LAWS OF MONGOLIA

ON LAND AND LAND FEES

BY

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September 4, 2001

I. Introduction

I have read through the "Law of Mongolia on Land" and the "Law of Mongolia on Land Fees". In principal, I find many things in the laws that I personally like and that make a lot of sense legally. I also find things that are potentially very confusing legally and that should be changed. I will make some initial statements concerning the law and the areas that I think are important for basic consideration. I will then go through the law article by article, stopping at articles where I think changes or comments are necessary. I have made certain assumptions, which I discuss, and I have tried to accept the principles on which this law is structured, as I see them, and make comments on whether I think the principles are workable or not. I am not looking at this draft from the point of view of creating a private system of landholding. I see it in terms of other systems with which I have worked, where the land is all vested in the government and the allocations to individuals and investors have been made for a potentially long term. I will try to note what the implications for such a system may be as I understand it. As I go through this draft, I will be commenting on both substance [content] and language. I will comment on the language of the English translation in order to advise on how things might be said smoothly and coherently as the English version of this law, when it is passed, should become an important element in attracting foreign investment [my notion]. This report has been considered in draft and I have had a dialogue with Ms. G. Uyanga of the USAID Economic Policy Support Project for additional translation and governmental structure clarifications and corrections. Those corrections and clarifications and have been added to the original draft to present this, my final report. I would now like to start my general comments.

a. Ownership

I have a great deal of trouble dealing with the concept of "ownership" as I see it presented in this draft. I read article 4.1.1 as meaning that all land in Mongolia is vested in the State. I have been corrected and told that this article simply means that the State shall protect the land against environmental degradation, etc. However, it still does not clarify the issue of "ownership", which I am afraid is not presented very clearly in the draft.

The reason I do not comment on "ownership" more specifically is that **the draft leads one to believe that "ownership" of land remains in the State.** This is true even though the draft refers to ownership by private Mongolian citizens. It is clear that the government of Mongolia can allocate land to be "owned" by a citizen of Mongolia. It is not clear when this is done or how it is done. The only process that I came away with from the analysis of this draft law is that there is an auction process that leads to ultimate possession of the land. My reading of that process is that it refers to the person as becoming primarily a "possessor" of land. The concept of possession in the draft law is clear. However, I think it should be changed to the appropriate nomenclature, as well. I think in the draft law there are **three processes** that need to be discussed equally – **ownership, possession and use**. I think the real discussion is the difference between "owning" and "leasing" [i.e. possessing and using] land. I would include "possession" and "use" as different types of leases and I would give equal treatment to the process of becoming an owner. In short, **I think there has to be added to the draft law articles which detail the concept of ownership**. I think that, for conceptual purposes, that is the biggest problem I see in the draft. There is no real discussion of how one can become an owner. For example, if the "auction" that is mentioned throughout the draft leads to ownership it is an improper process [I feel it should **not** lead to ownership as the auction creates too much potential imbalance in the landholding public] and therefore the manner by which one obtains ownership has to be clearly stated in the law. Secondly, and

certainly less importantly, the draft does not state that there is a systematic registration system which clarifies the concept of ownership. I only see fleeting and indefinite references to a registration system.

I have encountered the kind of structure that I assumed was meant to exist in other post-socialist systems where the new system creates a great deal of freedom for individual holding of land, but there is no actual "ownership" of the land in the private legal person. The "State" owns all the land and allocates it to individuals. In the draft, a qualifying person can possess a parcel of land for 15-60 years and renew his/her holding without limit, as long as he/she abides by the conditions of use set out in the written document. Even if a person dies mid-term, the land will pass to his heir or heirs until the term runs out. It is implicit, as the system is presented that once the heir has the land after the death of a parent or other relative, he/she will apply to extend the lease for up to 40 years [as the draft law allows]. This new person can then do this indefinitely. This in essence allows persons who have received land to receive it as a de facto owner unless they do not follow the "plan" for which they have received the land. In that case they can be asked to terminate their relationship and hand the land back.

On close analysis, the system of "possession" appears to be a system of ownership by which each person in possession of the land they receive closely resembles what one would call ownership. It isn't. This is apparently meant to be a form of contract of lease. However, the State still owns the land. It creates the impression that it is a form of ownership in that it can continue on indefinitely with no apparent terminal point as long as the person is adhering to the land use plans.

The first problem is in the nomenclature for tenure categories that are used. By referring to the two basic tenure types in the draft as "possession" and "use" [without reference to "ownership" in the same detail] there is a risk that there could be an interpretation that, in fact, the government is only holding the land to protect the person in possession; and that a real system of ownership should be recognized. This is certainly the impression that article 4.1.1 gives. I have seen such an interpretation in a system structured in exactly this manner. **The first thing I would do is create a traditional tenure category through which the persons in possession hold their land. This would mean changing all the "possession" and "use" categories to "leases" which is exactly what they are in traditional legal terms. The second is that I would develop the articles on ownership to make them very clear – when and how one can achieve such a tenure category.** This will provide a buffer against any frivolous interpretations that might construe the tenure categories set out in this draft as anything that is akin to "ownership".

Article 23.4.3 is a good example of a situation in which "ownership" is not dealt with. I am willing to accept that there is governmental authority at the different levels to deal with the demarcation, registration, etc. of leasehold lands. However, there should be authority within the governmental structure to deal with "owned" lands as well. If this article of the law is meant to deal with leases [possession and use] that is fine, but there should be a parallel article that deals with "ownership" because owned lands should be demarcated, mapped, registered, etc. in just the same way as leased lands. The difference is that on the "register" there would be a different notation. One would indicate the land is "owned" and the other would indicate the land is "leased" and where necessary the particulars would be given. For example, if the land was leased to a foreign government for an embassy, on the register there

would be a notation that the land is owned by the State and is leased to "X" country for "25" years.

In that case, "leasing" and "owning" have a parallel status, but this law does not treat them in a parallel way. The thrust of the draft is to make it clear that there is a "leasing" process in Mongolia that can involve Mongolian citizens, Mongolian companies, or foreign companies that are making investments in the country.

There are a couple of alternatives through which "ownership" and "leasing" can be included equally. (1) Have a separate section of the law on leases and either follow it [or precede it with a full section on ownership – how you get it, etc.]. (2) Deal with the leases and ownership concepts in a parallel manner in the same chapter of the draft by referring to "leases" in one part of an article and "ownership" in the next.

If the politics of Mongolia are such that the "possessors" must be recognized in the same way as "owners" are recognized in other areas of the globe, it certainly should be sufficient to mention that the lease arrangements are: (1) for the most part are indefinite and can last for long periods of time; (2) are inheritable; and (3) in general, operate in the same manner as ownership. The one clear hazard is that the government can intervene and take the land back if the possessor does not follow the plan for the use of the land or there is a "special need" for the land in question. In addition to providing separate provisions for contracts of lease and ownership, one should shorten the term for the leases. If there is a form of ownership for Mongolian citizens, they should be able to convert the contract of lease to ownership when it appears that they have met the conditions of land use for a requisite period of time. At the same time, even with ownership, failure to meet the conditions of proper land use should lead to forfeiture of the interest in land. At the same time, there is no reason to give a Mongolian company or a foreign investor an interest that can be indefinite, as is now possible under the provisions for "possession". I would provide a long enough term to allow them to do what they intend to do [there is presumable some investment purpose], but not longer than one sixty-nine year term [or some other acceptable term of years] with a maximum of one renewal for either an equal length or for some shorter period. At the same time, if the person [including company or foreign investor] is misusing the land or abandons it, then there is clear justification for the government to recoup the land and reallocate it. The law handles this latter process well.

b. Fragmentation

There is also a potential problem with inheritance of the lease/license [I am now going to refer to it in this way]. It is inheritable, as we have seen. One must assume that there is the possibility of having more than one person eligible to inherit [multiple heirs]. If so, there would have to be some kind of joint holding. The concept of joint holding is not dealt with in any substance in the draft law. If there is more than one heir, there would have to be a recognition of more than one lessee/licensee. There is also the likelihood that the joint holders will want to hold the land as individuals. Therefore, there has to be a partition process introduced in order to deal with the possibility of sub-dividing the land. Yet if the sub-division process continues, without new allocations, the original parcel will be reduced to a number of small parcels that will not be big enough for viable agriculture, grazing or residential purposes. The problems of fragmentation will be introduced. However, if it is not intended to have a partition or sub dividing process, the language of the law has to be very clear concerning how a situation with multiple heirs will be dealt with. The problem could be

solved by carefully developing a system of land allocation that deals with multiple heirs. It also means that there has to be careful consideration of how much land any one individual is allowed to hold at any one time. This leads to the third concern.

c. Auctions

I personally see a problem with the concept of auction. As I read the draft law there is no provision which talks about a maximum amount of land that any one individual can hold at any time. The use of the open auction [I did not understand the reference to a closed auction that appeared in the draft] is potentially going to lead to a system where individuals with capital will be able to offer more for land than those with no capital. On the one hand, they will help develop the land market, but on the other they will prevent individuals who do not have sufficient capital from bidding to get land. The result will potentially be the concentration of a great deal of the productive land in the hands of a very few rich individuals. I would assume that this is not desirable, but that an equitable distribution of land among citizens of Mongolia is what is desirable. I would set a maximum for the amount of land than an individual [including legal persons as companies] can hold in order to try to spread the land holding among as many people as possible. This can be done through regulations to the draft law. There might have to be a period of trial and error, but I think that the manner in which the draft law is now structured, will allow the richest of the Mongolians in short order to have too much of the land asset.

d. Land Registration

I find the references to land registration throughout the draft law are inadequate. It is clear that the issue of registration is considered important because it is regularly mentioned. However, to simply state that the registration will take place is not enough. There must be a full system of registration introduced. I assume it is not really in existence because the procedures of registration are not referred to in any specific manner and there is no reference to a law on registration that is in existence. I would take pains to develop the system of registration, even using the proposed institutional structure that is discussed in this draft law. However, I would investigate how a registration system works and what is necessary to introduce a proper system. In any case, it is necessary to make specific references to the registration law when there are references made to the system.

e. Land Use planning

I think the manner in which the system is decentralized in order to deal with the specifics of land use planning is acceptable to me. I state this a number of times in the article by article discussion. However, I am afraid, at this time, Mongolia may have a shortage of trained personnel who can develop the plans in the manner in which it is laid out in the draft law. I would think, as personnel are trained and available to perform the functions that are outlined, the decentralized planning process should be introduced. In the meantime, there should be a realization that the full process of decentralization of the planning process may be impossible at this time. An interim procedure should be introduced. However, as I said just above and say a number of times below, I think the system that is presented in the draft law is what should be aimed for.

f. Environmental Concerns

I find Chapter Six, "Efficient, Rational Use of Land and its Protection," as good a consideration of how to deal with environmental planning as any law I have recently seen. I plan on making reference to the procedure incorporated in this draft law to others with whom I work. I found it very pleasing to see how much effort has been put in to the provisions to make sure the environment is protected. I can say very little else.

g. Transition

I think there are some serious revisions that need to be made before this draft is formally presented to Parliament. The issues of "ownership" and "contracts of lease" [what is referred to a possession and use] need to be presented in a separate and clear manner. The land use planning provisions which call for local persons assuming a great deal of authority in the land use planning process has to be though through very carefully and potentially changed. There are issues, which I have referred to above and will refer to below, which need to be seriously considered prior to the submission of this draft to Parliament for consideration and before this law can be enacted.

At this point I would like to go through the draft law on an article by article basis. I will not say anything about an article if I feel that it does not have any difficulties of the language does not have to be changed. It should be noted, however, that there is some language consistently used throughout the draft that I think should be changed. I do not repeat the fact that it should be change every place the language appears. I will say it once, and perhaps repeat it one time, but it doesn't mean that I think it only should be changed in the articles in which a mention is made. The draft has to be reconstituted in a consistent manner. Thus, all articles have to be reviewed and consistent changes have to be made throughout the draft law.

In general, I like the law. There are difficult policy choices that have been made. I hope that my comments will strengthen the law and allow the government to stick with their policy choices in a sensible and creative manner.

I would now like to turn to the draft law.

II. Article by Article Comments

A. Law of Mongolia on Land

Article 3. Legal Definitions

3.1.2 – "to own land" – This definition, although it is clear in terms of what it intends to do, should be rethought. If you are going to have a version of the law in English then you have to be aware that there are certain words that connote certain very specific concepts. "Ownership" or "owning" some thing is one of those words. It has a specific meaning even though one can define it to mean something different. The tendency is for people to understand what "ownership" is or what "to own" might be, and conclude that it has the traditional meaning. Since the clear thrust of the law is that all land is vested in and therefore "owned" by the government, it would be best not to use that word. In fact, the possessors or the users of the land are not "owners" of the land in the traditional sense. It is best not to confuse the issue concerning ownership and refer to the legal status that technically really exists. I would use the term "lease" or "contract of lease" as I have already said in the general part of the consideration of the draft law. I think it is better not to confuse the issue by using a word that can be interpreted to mean something that the law does not intend it to mean.

3.1.3 and **3.1.4** - The definitions of "to possess land" and "to own land" should be rewritten to put them in the specific context of tenure categories rather than an abstract or vague conceptual framework that does not really explain what "possession" or "use" is all about.

I would also not use these words and substitute the word "lease" for both of them, as I have stated elsewhere because in English the relationship of the person holding the land to the land is one that exists when a lease is in existence.

3.1.6 – The definition of "pastureland" is so generally known that it is probably unnecessary to have a special definition for this tenure category. I think the definition section of the law is there for you to define words that might be technical or have a special meaning that is not understood in the general course of events.

3.1.7 – I will not continue editing the draft, but there are places where the English needs some simple correction. For example, in the second line of this sub-article it probably should read "and economic entities <u>which have made</u> foreign investment…"

Article 4. Principle Regarding Land Pursued by the State

4.1.1 – *"the land shall be under the State control and protection;"* This is not clear from a technical point of view. Perhaps there should be a definition of "control of land" and "protection of land." Where protection is a clearer concept, "control" could simply mean "vested in" without the traditional meaning of ownership and therefore could potentially contribute to the confusion of the "ownership" concept.

After consultation with Ms. Uyanga, it has been clarified that the law in Mongolia states, rather that the State shall keep a watchful eye on the use of the land asset for environmental and other purposes. The English translation needs to be clarified to reflect this.

4.1.3 - *"fairness and equity shall be ensured in land owning, possessing and using;"* It is not clear what is meant by "fairness and equity". Also there is a reference to three tenure categories "owning", "possessing" and "using" and I think if you look at this closely through the definition of "ownership" that is contained in article 3.1.2 there is bound to be some confusion as "possessing" and "using" are both tenure types. In this context "owning" is not. Yet they are presented equally and should not be.

4.1.5 – The restriction on land use are very general and should be cross-referenced like adding to the end of the article "as set out in chapters X Y of this law".

Article 5. Land Ownership

5.1 – *"Land, other than that owned by the citizens of Mongolia, shall be a property of the State."* As I have said in my introductory comments, I think there should be provisions on "ownership" in this law which are parallel to the ones of lease [possession and use]. This is fundamental. Right now the concept of ownership is very misleading and should be changed. Since the basic thrust of the draft law is to deal with possession and use and what procedures are necessary to perfect them, the assumption is raised that "ownership" is merely State. It does say that citizens can own, but one then concludes that whenever the state decides to give ownership it will do so without any specific procedure attached to it. At the same time, the possession provisions allow such long tenure that it can also be thought to give a form of ownership. These all have to be clarified systematically in the draft law.

5.2 - What is "common tenure land?" It probably should be defined in the definitions article. For the purposes of this report I assumed it was "public land."

Article 6. Land Possessor and User

6.1 - The language *"citizens, economic entities, organizations and economic entities with foreign investment"* is referred to throughout the draft law. This is awkward. Perhaps it should be defined at the beginning as a "possessor" or a "user" and then in the rest of the law either as a "possessor" or a "user" can be referred to. As I said above, it probably should be referred to as a lease and the persons would then be lessees.

6.2 - It is unclear what "common purpose" refers to. Perhaps it should be "public lands" or "public areas" if that is what it really means.

6.3 – This clause is fine, but perhaps it should be in the definition section. If you want it to be here then the "possessor" language should be presented in a parallel manner. There is no sub-article that deals with "possessor".

Article 8. Border Register, Maps of Land and Water Geographic Names and Land

Territory, Land and Water Geographic Names

8.1 – In my draft report I asked for clarification on what a border register is. If it is a reference to a map that shows borders the appropriate language should be used.

This has been clarified, but still needs to be stated clearly in the Draft. The following is the explanation I received from Ms. Uyanga and it should be edited to clarify the article:

> "Each administrative/ territorial unit shall have maps showing its borders, names of geographic units and land classification. [Literally, it says instead of 'land classification', 'land reserve'.] When I made an inquiry at the Ministry of Nature and Environment, they said that this 'land reserve' means distinguishing on the map between agricultural land, urban settlement land, i.e, classifications set forth in Clause 10.1., 1 to 5. Clause 8.1. refers to 'maps' because, as I was informed, it means three different types of maps - one showing borders, one showing names of mountains, rivers, lakes, valleys, etc, and a third one showing land belonging to different classifications."

8.2 - The "Government's Competent Organization" appears here for the first time. This is awkward and it appears throughout the draft. Different language should be used something like "the organization designated by law" or "the government organization as set out by law". Then there can be a legal designation for the organization that is responsible for all of the land related issues. It can also be a private organization if it is so desired at some time by leaving out the "government's".

8.3 - This article should be retranslated to say:

> "Territorial maps of each administrative/ territorial unit showing their borders, names of geographic units and land classification shall be kept by Governors of corresponding levels; and the full copies covering the national territory shall be kept by the corresponding government authority."

Article 12. Lands of Cities, Villages, and Other Settlement

12.2 - "Common tenure" is referred to and it is clear here it is "public lands" which is a better designation in the English language.

CHAPTER THREE

AUTHORITIES OF THE STATE AND LOCAL SELF-GOVERNING ORGANIZATIONS REGARDING LAND RELATIONS

I like this chapter. I think it is complex, but it captures the essence of how the decentralized system is going to work and the land use plans or land management plans are going to be developed. That is, of course, if it is realistic and there are sufficient personnel to man the entire system from bottom to top. See, comments above.

Article 17. Authorities of the State Great Khural

17.1.2 - The reference to "use of land" is fine, but it does not have to then be translated as users. It says in the article by "lease or concession" and then throughout this article and the rest of the draft the "use" category should be referred to as "lease" or "concession".

Article 19. Authorities of the State Central Administrative Organization in Charge of Land Related Issues

Is the "State Central Administrative Organization" different than the "Government's Competent Organization" which first appears in article 8.2? If it is the same, and it does seem to be, then it should be referred to in the same manner. If the vagueness is set up so the "regulations" can be written to specify the name and functions of the "organization" then this is not a bad approach. However, the rest of article 19 and the ones that follow delimit the functions of this "organization" There can be different approaches to this reference. Either the reference is made only to the organization that will be named in the regulations and its functions will be spelled out there, or just the organization will be named in the regulations. One can then leave the functions in the draft. However, it is a bit awkward to have such specific function set out for an organization that is not designated.

19.1.1 - The language here says "organize implementation", I think it should be clear that the government institution in charge of land is the policy making body and does not have line functions. If that is what "organize implementation" actually means.

19.1.5 - This is the first time the word "auction" appears. It is strange for it to keep appearing until much later in the draft when it is finally clarified. It should be in the legal definitions section and a brief statement should be made defining "auction" in the manner in which it will generally be used. Other specific uses of an auction or changes in the usual procedures that applies to auctions can be included in the sections which set out specific procedures or specific uses of the auction.

Article 20. Common Authorities of the Aimags, Capital City, Soums, District Citizens' Representatives Khurals and Governors

20.2.5 - In the second line of the sub-article it should read as follows: "need, as defined in article 16.1, upon…."

20.2.6 - In line 3 of the sub-article what does "organize" mean? I think it is a bad choice of a word in translation. A suggested change in the English translation is:

> "To make decisions and organize implementation of decisions on enforcing citizens who possessed or used land without appropriate authorization, or who caused significant degradation of land, to vacate the land."

20.2.7 - This language actually appears to say that decisions can be appealed to any of these bodies from the authorities below it. They also have the power to affirm the lower opinion, not only to "annul unlawful decision". Therefore, it might make better sense to edit the language so it says these institutions or persons can hear appeals.

Article 21. Capital City Citizens' Representatives Khural and Aimag, Capital City, Soum, District Governors' Special Authorities

21.3.1 - This says "give directions." It might be better to say "assist" or some other more neutral word which connotes cooperation between the institutions.

21.4.1 - Here it says "propose amendments". There is a question of the consistency of power between the different government institutions. From a narrow reading of this language, it appears as if the Aimag Governors do not have the power to propose amendments. They are instigators of the drafting process, but have to accept what is drafted. The Soum governors can review the submission and can propose amendments. If this is the way it is fine, but it would seem that at each level the governor would have the power to review the draft and make suggestions.

21.4.2 - The Soum governors submit the land management plan to the Khural who approve it. It might be better to put the following language is at the end of the sub-article. "in accordance with the general land management plans, as approved by_____"

21.4.3 - The concept of an "auction" starts here. Please see articles, 21.5.3, 23.2.7, 33.1.2, 34.3,34.4, 36.1, 44.4, 56.2, 56.5 and all of article 36. These all refer to an auction. It is not until later in the draft that there is an appreciation of the auction concept. As I have said elsewhere in the report, the definition and function of the auction has to be presented in the definition section. It might clear up the confusion that arises when you read the draft law from the beginning.

Article 23. Structure and Authorities of the Government Competent Organization

23.2.5 – The current English translation of the draft law says "consolidate annually". That is unclear and should be changed to:

> "Each year, to consolidate and submit a land report for discussion to the State central administrative authority in charge of land relations."

It has also been clarified to me that this authority is the Ministry of Nature and Environment. Unless it is anticipated that there will be name and authority changes, the Ministry should be referred to by name. Otherwise it should be referred to in regulations and the reference within the law should be to the regulations.

If this is referring to a report which clarifies the changes in land classification, which took place during the year just past, it should state so in a clear manner.

23.4.3 – Again, the English translation should be changed to

> "To mark boundaries of land given for possession or use, to determine their longitude and latitude, to create their cadastral maps and to register them in the national land registry."

It seems to me that there should be a very detailed set of regulations that go along with article 23. This appears to be the "registration law" that is a necessary procedural

guideline to the government authorities. This would mean a land register, registration forms like applications, various index books, and the different databases which are referred to in the article should be defined and set out for registration purposes. If it is not intended to have a registration law, then regulations which define how this article is meant to work are crucial to develop as the definition of the entire registration system is missing.

Article 24. Land Management and its Financing

24.1 - There is small amount of English language editing to be done. On the first line it should read "activities aimed at implementing" and it is not accurate to say "conducting a land register". The language should be changed. It is not clear whether it is meant to be "creating" or some other concept. In any case, it is unclear.

24.2 - In its current English version it is unclear what is meant by the "Professional Organization" authorized by the State. This could mean a number of things. If it means an organization of "surveyors and "cartographers" or other type professional people, it should say so. If it is unclear whether it is going to be "a state organization", i.e. a public one or "a private organization" this is the time to make that decision. However, to call it "a professional organization" is inadequate.

This has been clarified with the following comment: "Land management shall be carried out by professional organizations authorized by the State central administrative authority in charge of land relations." The translation should be clarified.

24.3 - What is the "assessment of land management?" Is it a tax or is it the cost of preparing the plans and maintaining the administration? This needs to be a little clearer. It may simply be the choice of the words "determine assessment." In response to my query I received the following "The government shall establish prices and tariffs for land management services". Such a change in the translation would clarify the situation.

24.5.1 - There is a question left as to how land registration will be financed. If land registration is considered part of "land management", perhaps it should be so stated as there are rules of statutory interpretation that would limit the categories to those enumerated in this sub-article. If land registration fees are to be included as "for other related activities" then it is probably important to say it specifically in the article. However, if it is not meant to include land registration, there should be a separate statement indicating how land registration is to be covered. I did not see a reference to registration fees in the "Law of Mongolia on Land Fees."

Article 25. Land Management Main Documentation and Their Requirements

25.1.6 - The word "registrar" in the sub-article is not right. It probably should be "a land register" which is the one page document of registration. The use of the word "registrar" occurs throughout the draft. It should be changed to reflect the proper word.

25.3 - On the second line it should refer specifically to "in the provision of article 25.2 to be ….."

25.5 - Do the relevant laws exist? If so they should be cited by name or number. If they don't, it is important that they do exist they are part of this entire system that is contained in this draft.

Article 26. Land Cadastral Registry, Unified Land Territory Report

26.3 - This sub-article needs to be clarified - "drawings of the changes attached" seems to mean "revised survey plan which can be incorporated into the existing maps".

CHAPTER FIVE

LAND POSSESSION AND USE

I have said above in my general comments that I think labeling the tenure categories as "possession" and "use" is really not what is going on legally. There is a "lease" arrangement with differing conditions that is captured in the written document that spells out the relationship of the person who holds the land with the government. I think this is serious enough to try to prevent the wrong type of interpretations that might be made by the courts in the future to spell out the relationship with accuracy. That relationship is one of "lessor and lessee" and should be stated in that manner.

Article 27. Land Possession [should read "Leases for Private Persons and/or Investors." The titles of the succeeding article in this Chapter through to Article 51 should all be changed to reflect the amended language.]

27.1 - The reference to a "license" seems to mean the existence of a written document that legalizes the relationship the landholder has with the government. I would refer to this document as either "a written contract of lease" or "a lease" and at the end of the sub-article on line two I would add the words at the end "of lease".

27.4 - The fact that the "license" is just the document or contract of lease is emphasized in the sub-article, stating that it is merely a legal document which clarifies the relationship. In strict terms a "license" in land law means the right to use or enter on to land. I don't think that this is the purpose intended here. It is clear that the legality of the relationship is supposed to be captured in the written document. I would not call it a license.

Article 28. Types of Land Possession Licenses

I would rename this article – "Purposes for which Leases Can be Entered Into" or something similar.

28.1 - I would reword the beginning by stating "It shall be possible to have the following type of leases:"

Article 29. Size and Location of Land to be Possessed by License {should be Lease]

29.1 and **29.2** - The measurements for residential plots and anything related to them should be presented in m^2.

Article 30. Duration of Land Possession

30.1 - The language "to citizens economic entities and organizations of Mongolia and economic entities with foreign investment" should be stated once and then not repeated in every article of this draft where these legal categories are referred to. There should be a short cut term which refers to them as possible "leases to private persons or for investment purposes" [which is still cumbersome] as opposed to "the "use" categories which can be referred to as "leases with international implications".

The implication of the leases to private persons or investors seems to be able to be renewed forever as long as the conditions for which the lease was given are met. There is nothing wrong with this, but if the Government of Mongolia wants to have a fixed maximum length on this type of lease it should be clearly stated in the law. If there is not to be any kind of maximum length for which a person or his/her heirs can possess the land, it should be stated. In light of the fact that there is actual ownership which is allowed, there should be a distinction between the "possession" and "use" which I have referred to a "contracts of lease" and the tenure category of "ownership". The contract of lease should be for a finite period and should not be able to be renewed forever. There should be a cap on the number of years for which a lease can be held. If it reaches the maximum, and a Mongolian citizen is involved, there should be some way to convert it to "ownership".

30.2 - The fact that a person who dies or is declared missing [there must be a legal definition of what constitutes a "person who is missing"] during the course of the lease can pass the land on to his/her heirs implies that the heir can then ask for an extension at the end of the lease term as the deceased or missing person could have done. The article should specifically state that an heir is only limited to the remainder of the deceased's or missing person's term, if it is so intended. Without a specific reference, it will be interpreted that the heir can stand in the shoes of the person he/she replaces and continue to ask for extensions of the lease period as long as the conditions for which the lease was issued are met.

The assumption must also be accepted that the word "successor" could include more than one person. There is no reference to the law of inheritance, so I am assuming there is a possibility that there could be more than one person who would assume the lease. If that is so, what happens? Do they hold jointly? Can they subdivide the land if they each want to have a separate lease, etc.? The law must reflect those eventualities or at least refer to something that will explain what happens if more than one "successor" is to get an interest in the lease. Is there a minimum sized parcel to prevent fragmentation from taking place?

Article 32. Request for Land Possession License [should read "Request for a Lease for Private Persons or Investors"]

32.6 - In the second line it should read "attached documentation."

Article 33. Granting Land Possession License [should read "Granting a Lease to Private Persons and/or Investors"]

33.1.1 – This section should be retranslated to the following:

> "Decisions giving land into possession in accordance with provisions 29.1 and 29.2, as well as in order to enable state budgetary organizations to fulfill their duties, shall be made by Governors of soums and aimags."

33.1.2 - This sub-article is confusing. It refers to an auction that can take place when certain conditions are present. However, if I am reading this draft correctly there is usually an auction involved in the allocation of the land. As I already said, the concept of the auction has to be presented earlier in the draft. It should probably be in the legal definitions and there the concept of the auctions can be laid out so that the person who is reading this law can understand the procedures that are used at the outset. I was baffled by the concept of the auction until I to this sub-article.

I am a bit perplexed by the auction concept. I would think that one of the goals of this law would be to allow land holding to be spread as widely as possible among members of the Mongolian society. I understand there are many nomads and that does not agree with increasing the numbers of people who hold land. However, nomadism is or will be on the decline and the policy should not encourage the rich persons [those would be the persons who can bid the highest for land] start gaining large numbers of parcels. If the policy is to provide land for as many people as possible, the auction system does not support that concept. It would allow the people with capital to bid the highest to get the land. If the policy of the Mongolian Government is to spread land holding as widely as possible among the citizens, and investors, a set of priorities have to be established. That might mean setting a maximum amount of land that an individual may hold at one time. If the policy is simply to try and develop the economy without any consideration about making land available for as many citizens as possible, then the auction system and land to the highest bidder makes sense.

33.4 - If I am not mistaken this sub-article seems to say "Land must be allocated for the purposes stated in the annual land management plan". If that is correct the sub-article should be changed to say this.

Article 34. Contract Licensed Land Possession and Procedures for its Conclusion [should read "Contracting a Lease"]

34.1 and **34.2** could be read to conflict. I think there should be a clearer reference to the successive acts that are involved in these two provisions.

34.5 - There should be a reference to "a unique parcel registration number" instead of "a number of the possessed land unit".

34.6.3 – Appears to be referring to a "survey plan". It should say so.

34.9 - This is the first mention of "joint possession". There are implications of this and it should be stated somewhere in this law or referred to in another law where it is dealt with. In the English translation I assumed the "vent" meant "event".

35. Rights and Duties of License Holders [should be Rights and Duties of Lessees]

35.1.3 - Should be rewritten to say "compensation for the damages caused to the land."

35.1.4 - The word "pawn" seems to refer to the technical legal concept of "pledge". If so, the language should change to reflect that. In fact, later on the word "pledge" is used. So the language should be changed to be consistent.

35.3.6 - This is just a standard provision of a land registration act. I think that it would be best to somehow get all the land registration issues in one place, so that one can understand the rights and obligations that flow from registration. It is also important to understand the role the registrar plays. It is, in fact, not improper to have this reference here, but for the overall system there should be drafted a regular land registration law which could be separate or included as part of this comprehensive land law.

Article 36. Auction Price of a Land Possession License

36.4 - This seems to imply that the Cabinet has to deal with each lease that is being transferred. I would think language should be included to make it clear that the Cabinet does not have to do it personally, but that a delegation of function is involved. Unless, of course, the land issue is considered so important that the Cabinet feels it has to personally deal with this issue.

Article 37. Extension of License Term

37.2 - At the very end of the section the words "register it" should be replaced with "refer it to the appropriate registration office."

Article 38. Transferal of License to Others

38.1 - The language in line 1 should read "transfer or pledge" and on line 2 it should read "lease transferal or pledging". This article should be edited to reflect all the recommendation of changes set out.

38.3 – There should be language added stating that this also applies to heirs.

Article 39. Land Possession License Expiration [should read "The Expiration of the Lease"]

39.1.3 - Should read "where lessee requests to terminate his possession rights" or "where lessee requests to terminate his lease".

Article 40. Termination of the License Possession Rights [this should read "Termination of the Lease"]

40.1.1 - This should be rewritten to say "where the lessee failed to meet the provisions of either his lease contract or those provisions of the land law."

40.1.5 - This should be changed to read "where the lessee has not paid the land fee payable pursuant to the law within [state a time period or say a reasonable time]."

40.3 - There should be some manner to petition to an institution within the government land bureaucracy or to a special tribunal set up to deal with land issues prior to going to court. It should be part of this law to try and prevent land disputes from going to and clogging up the courts.

Article 41. Release of Land on Expiration of the Land Possession License [should read Release of Land on the Expiration of the Lease]

41.1 - Is 90 days the optimum time period to get the land back? Should it not possibly be shorter? See also, Article 43.1.

41.4 - There should be a penalty attached if the person does not give up the land within the stated time period. Otherwise people will not give up their land and will wait until they are evicted. This can be very cumbersome especially if the courts are clogged with cases and it is necessary to pursue an eviction case to the courts. There could be a substantial time lag before the person vacates the property.

It is also recommended that a penalty is attached to eviction that would make it impossible for a person who has been evicted from one parcel to be eligible for a new lease for a certain number of years.

Article 42. Changing or Taking Back of Land Possessed by Others with Compensation before the Contract Expires

42.4 - Why are there date restrictions?

Article 43. Granting of Compensation for Changing or Taking Back Land Possessed by Others Prior to Contract Term Expiration

43.6 - This sub-article is not necessary. If everything is proper with the lease there should be no request for compensation and if there is such a request in a lease which is being properly handled, it should be clear that the need be no compensation. I would eliminate this sub-article.

Article 44. Land Use [This should be changed to "Leases to Foreign Government or Organization"]

This article still deals with leases, but the lessee is not the same as the persons involved in the leases we have just finished considering. So the best way to deal with these type of leases is to spell out who the beneficiaries are.

44.3 - At the end of this sub-article it should read “”international treaties with the Mongolian Government”. The words “by Mongolian” that precede “international” should be omitted.

44.4 - Why use an auction here?

Article 48. Entering and Crossing Land Possessed or Used by Others

48.2 - There should be a reference to regulations here where the language of the signs can be set out. It should not be implied that anyone who wants to determine what sign to use can come to the government office to get directions. The regulations on this article should deal with this issue.

Article 49. Use with Limited Rights of Land Possessed or Used by Others

49.1 - The concept of ownership is brought in here. I am perplexed by it. I have concluded that owners who want to put power lines or other incidents across their land must be the state. In fact, the reference to owner seems to mean the state. If one takes that position and views all “possessors” and “users” as “lessees”, i.e., beneficiaries on a contract of lease, the system is easily understandable.

49.2 - This allows the creation of servitude. The proper language should be used.

Article 50. Preserving the Right to Use Land with Limited Rights

50.1 - This article can be rewritten for clarity sake. It can read “In the event the lease is transferred to another legal person, if a servitude exists, it shall continue to exist.”

50.2 - I do not understand what the sub-article means. As I understand it the “owner” is the government of Mongolia. If it means that only the government can get the rights to build roads, put in power lines, etc., then it makes total sense.

Article 51. Expiration of Property Rights upon Expiration of Land Use Rights for Certain Bodies

51.1 - I am not sure I understand this article. If it says, when the lease expires the right to continue using the buildings on the land also expires unless the contract of lease allows the lessee to continue using the property, then it makes sense. However, I had some difficulty figuring out what it might mean.

CHAPTER SIX

EFFICIENT RATIONAL USE OF LAND AND ITS PROTECTION

Articles 52 – 60 are among the strongest in the draft. There is very little to comment on. In fact, the drafters should be commended on taking a proper environmental stand. There is one problem that I have already raised. It is giving the power to the local officials to make decision on the proper “use” of land. This will often involve scientific determinations and it has to be clear that the officials at the local level are generally the least educated in the hierarchy. There has to be a recognition that is it essential that the officials from the central

authority must be called in, at least, for consultation when there are questions of a complicated scientific or other nature.

Article 52. Common Requirements for Efficient and Rational Land Use and Protection

In the title of this article the word "use" is employed. Since "use" is a tenure category in the law, it could create some confusion. This is just another argument for changing "possession" and "use" to "lease" to avoid any confusion of language.

52.1.5 - I still do not fully understand why the concept of owner is being used. In this sub-article it is not necessary to refer to "State lands" and the land "possessed or used" [meaning leased]. The reference should be a catchall and refer to "activities which have adverse impact on the environment and the land of Mongolia". This should include the state owned land and all of the land which is leased.

Article 54. Pastureland, Its Rational Use and Protection

54.7 - I do not understand this reference. Does it have something to do with common tenure or public lands?

Article 56. Rational Use and Protection of Crop Cultivation Areas

56.2 - This article seems to be out of place. It should go elsewhere in the draft.

The reference to three years seems to be a little long. I would think that lack of use for two successive growing seasons would be enough to terminate. I also would not use the term years, as there might be more than one growing season in a year. I think the substance of the article should be that a person who does not cultivate in two succeeding cropping season has had enough of a chance to show he is disregarding the land. Steps should then be taken to terminate the lease and have the land revert to the government for reallocation.

56.5 - I do not know what a "closed" auction is as compared to an "open" one. If it means the power exists to restrict persons who are allowed to bid, this may be a good provision. As I have said elsewhere in this report, I do not think it advisable to have open auctions that will allow rich persons to gain control of large amounts of land. This article on "closed auctions" should probably appear in the Chapter Five where land possession and use [leases] are delineated.

Article 60. The Land Characteristics and Quality State Certification and Procedures on Its Delivery

60.8 - The sentence here is not complete it ends "and quality by the"…..

CHAPTER SEVEN

MISCELLANEOUS

Article 61. Responsibilities of the Police Organization on Land Relations

61.1.1 - The sentence should start with "to"; the word "where" on the first line should be changed to "that", land possession and use rights should be changed to "lease" and the word "have" on line 2 should be changed to "has."

61.1.2 – The sentence should also start with "to". At the end of the sub-article "organized delays" should be changed to just "delays". The delays needs not necessarily be organized.

Article 62. Responsibility of the Court Decision Enforcement Agency Regarding Land Relations

62.1 - This article needs to be smoothed out. The word "contradictions" needs to be changed. It probably should be "disputes."

Article 63. Settlement of Land Related Disputes

63.1 - On line two of the article it should say: "which have arisen."

63.1.4 - This seems to be referring to servitude. There is no reason why these disputes should go directly to court. There should be some kind of internal dispute settling mechanism within the government institution in charge of land that can try to terminate disputes so they don't go to court. Even then if the internal dispute settling office within the government institution can't settle the matter, the court should be a last resort and then only for disputes that are on legal questions.

Many of the disputes that arise involving land are factual questions. They do not belong in court using valuable time that can be relegated to other types of real legal disputes. It is strongly recommended that the possibility of setting up an alternative type of dispute managing institution, like a land mediation board or a land tribunal so that land disputes can be handled informally and efficiently. There are examples, which I can provide, if it becomes relevant, of different types of institutions that have been set up to deflect the land [and other types of] disputes from the courts.

Article 64. Annulment of Illegal Decisions, and Terminating Actions

This appears to say that there is the power to appeal decisions, which can be overturned if wrong. It should say it more clearly and precisely.

Article 65. Compensation for Damage

This article is fine. It does need to be written a bit more concisely and clearly.

Article 66. Liability for Violation of Legislation

66.1 - At the end of the sub-article the "volume of damage" should be changed to "amount of damage."

I would take out all the reference to amounts of money imposed as fines and duration of jail or prison time to be served. This is simply because the value of money changes over time. It will not be too long before the fines will either be very low, or they will

be very high if there is a revaluation of the currency. I would suggest that an additional sub-article be added which says the following:

> "66.3.21. For any violation of this law a fine or imprisonment shall be imposed which reflects the seriousness of the violation and shall not vary from the stated time or amount which is included in the regulations to this law."

This will allow the regulations to be changed without the necessity of going back to Parliament for an amendment to the law when the value of the fines or the length of imprisonment becomes inappropriate.

Article 66A. Repeals

If there are any laws that need to be repealed, they should be repealed by the insertion of an article at this point in the draft.

B. Law of Mongolia on Land Fees

The Law on Land Fees is straightforward. The major question I have is whether there is a relationship to the auction price and the fee. If the auction price is a bid which is paid as a fee to get the contract of lease [possession] then there need be no relationship to the fees. However, I do not understand the relationship between the two. Article 1.1 refers to the imposition of fees for possession and use of state owned land. The second point is that there are simply small points of clarification in the Law of Fees that have to be dealt with. It is essential to remember if there is any language change in the Land Law then the terms have to be changed in the draft Land Fee law.

Article 2. Legislation on Land Fee

> This needs a clarification. It refers to the legislation on land fees shall consist of… However, this is the legislation on land fees. It probable means "In addition, to this law, the other laws that refer to land fees are……"

Article 7. Land Fee Assessment Indicators

> **7.1.1** - The reference is to a sheep as the basic unit of livestock to which all should be converted for value purposes. Does this need to be explained more fully?
>
> **7.1.3 -** Appears to refer to "residential" property. It should say so.

Article 8. Land Fee Amounts

> **8.1.1.1** - The use of the word "evaluation" is unclear.
>
> **8.1.1.6** - On the first line, the word after cultivating should probably be "vegetables."
>
> **8.1.2.1** - The reference here appears to be to "residential" property. It should say so.

Article 11. Land Fee Imposition

11.1 - The reference to "registration" needs a better reference. There should be direct reference to the Registration Law. If it does not exist, it is essential that it be drafted.

III. Final Comments

As I have presented in this report, I think that there are some excellent parts in the draft law. However, I do not think this draft is ready for Parliament without some rather serious alterations, as there are a few policy questions [as noted] that I feel have to be seriously reconsidered.